



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1210**

**[Document Number AMS-FV-11-0031]**

**Watermelon Research and Promotion Plan; Importer Membership Requirements**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Watermelon Research and Promotion Plan's (Plan) importer membership requirements to serve on the National Watermelon Promotion Board (Board). The Board recommended eliminating the requirement that an importer import more than 50 percent of the total volume handled and imported in order to qualify as an importer member. This change allows for additional parties to qualify as an importer member. The U.S. Department of Agriculture (USDA or Department) conducted a referendum among eligible producers, handlers, and importers of watermelons from January 13 through 27, 2014. Seventy-four percent of those voting in the referendum favored amendment of the Plan. Additional revisions are made to remove unnecessary language in the Plan and regulations. Also, a section of the regulations is clarified and revised accordingly.

**DATES:** Effective Date: [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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**SUPPLEMENTARY INFORMATION:** This rule is issued under the Watermelon Research and Promotion Plan [7 CFR part 1210]. The Plan is authorized under the Watermelon Research and Promotion Act (Act) [7 U.S.C. 4901-4916].

As part of this rulemaking process, a proposed rule was published in the **Federal Register** on February 13, 2013 [78 FR 10104], with a thirty-day comment period, which closed on March 15, 2013. Sixteen comments were received by the March 15, 2013, deadline. These comments were discussed in a second proposed rule and referendum order that was published in the **Federal Register** on October 29, 2013 [78 FR 64408].

Pursuant to section 1655 of the Act, a referendum was conducted among watermelon producers, handlers, and importers to determine whether they favor amending the Plan to eliminate the requirement that an importer import more than 50 percent of the total volume handled and imported in order to qualify as an importer member.

The representative period for establishing voter eligibility for the referendum was the period January 1 through December 31, 2012. Section 1653(b) of the Act requires that the amendment be approved by a majority of watermelon producers, handlers, and importers voting in the referendum. Producers of 10 acres or more of watermelons, watermelon handlers, importers of 150,000 or more pounds of watermelons annually, and importers of less than 150,000 pounds of watermelons annually who did not apply for and receive reimbursements of assessments during the representative period were eligible to vote in the referendum. Additionally, eligible voters had to currently be engaged in the business of producing, handling or importing watermelons. The referendum was conducted by mail ballot from January 13, 2014, through January 27, 2014. Seventy-four percent of those voting in the referendum favored amendment of the Plan.

Additional revisions are made to remove unnecessary language in section 1210.363(b) of the Plan and section 1210.602(a) of the regulations. The language pertains to the conduct of referenda and is no longer applicable as a result of the Watermelon Research and Promotion Improvement Act of 1993, amendments to the Watermelon Research and Promotion Act.

Lastly, section 1210.404(g) of the regulations, which references importer eligibility requirements, is amended to

conform to language amending section 1210.363(b) of the Plan that has been approved in referendum.

#### **Executive Order 12866 and Executive Order 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a "non-significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has waived the review process.

#### **Executive Order 13175**

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review revealed that this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

#### **Executive Order 12988**

In addition, this rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have retroactive effect.

The Act allows producers, producer-packers, handlers, and importers to file a written petition with the Secretary of Agriculture (Secretary) if they believe that the Plan, any provision of the Plan, or any obligation imposed in connection with the Plan, is not established in accordance with the law. In any petition, the person may request a modification of the Plan or an exemption from the Plan. The petitioner will have the opportunity for a hearing on the petition. Afterwards, an Administrative Law Judge (ALJ) will issue a decision. If the petitioner disagrees with the ALJ's ruling, the petitioner has 30 days to appeal to the Judicial Officer, who will issue a ruling on behalf of the Secretary. If the petitioner disagrees with the Secretary's ruling, the petitioner may file, within 20 days, an appeal in the U.S. District Court for the district where the petitioner resides or conducts business.

#### **Regulatory Flexibility Act and Paperwork Reduction Act**

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601-612], AMS has examined the economic impact of this rule on the small producers, handlers, and importers affected by this rule. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that

small businesses will not be unduly or disproportionately burdened.

The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms (handlers and importers) as those having annual receipts of no more than \$7 million. Under these definitions, the majority of the producers, handlers, and importers affected by this rule would be considered small entities. Producers of fewer than 10 acres of watermelons are exempt from this program. Importers of less than 150,000 pounds of watermelons per year are also exempt.

USDA's National Agricultural Statistics Service (NASS) data for the 2012 crop year indicates that about 306 hundredweight (cwt.) of watermelons were produced per acre within the United States. The 2012 grower price published by NASS was \$13.30 per hundredweight. Thus, the value of watermelon production per acre in 2012 averaged about \$4,070 (306 cwt. x \$13.30). At that average price, a producer would have to farm more than 184 acres to receive an annual income from watermelons of \$750,000 (\$750,000 divided by \$4,070 per acre equals 184). Accordingly, as previously noted, a majority of the watermelon producers would be classified as small businesses.

Based on the Board's data, using an average of the freight on board (f.o.b.) price of \$.181 per pound and the number of pounds handled in 2012, none of the watermelon handlers had receipts greater than the \$7 million threshold. Therefore, the watermelon handlers would all be considered small businesses. A handler would have to ship more than 38 million pounds of watermelons to be considered a large entity (38,674,033 times \$.181 f.o.b. equals \$7 million).

According to the Board, there are approximately 950 producers, 230 handlers, and 137 importers who are required to pay assessments under the program.

Based on the watermelon import assessments received for the year 2012, the United States imported watermelons worth over \$237 million. The largest volume of watermelon imports came from Mexico, which accounted for 86 percent of the total volume in 2012. Other suppliers of imported watermelons are Guatemala - at 9 percent, and Honduras - at 2 percent. The remaining 3 percent of imported watermelons came from Costa Rica, Nicaragua, Canada, Dominican Republic, and Panama.

Based on U.S. Customs and Border Protection (Customs) and Board data, it is estimated that there are about 201 importers of watermelon. Not all of these importers are required to pay assessments under the program. Using 2012 Customs data, all of the importers import less than \$7.0 million worth of watermelon

annually. Therefore, all of the watermelon importers would be considered small entities.

The Board's audit records show import assessments for the calendar years 2010, 2011, and 2012 at \$746,043, \$855,890, and \$824,897, respectively. Based on this data, the three-year average of import assessments for watermelon totals \$808,943 (\$2,426,830 divided by 3). This represents approximately 30 percent of the total assessments paid to the Board. Currently, the Board membership distribution consists of 14 producers, 14 handlers, 8 importers, and 1 public member. A final rule that increased the number of importers on the Board was published in the July 18, 2011, **Federal Register** [76 FR 42009].

The Watermelon Research and Promotion Improvement Act of 1993 amended the Watermelon Research and Promotion Act by adding importer members to the Board, among other things. At that time the industry recommended that an individual who both handles and imports watermelons may vote for importer members and serve as an importer member if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person. A final rule was published in the **Federal Register** on February 28, 1995 [60 FR 10795] containing this and other amendments to the program.

At the time of this amendment there was a more clear division of roles among producers, handlers, and importers. In



other words, those individuals who imported watermelons did not cross over into handling or producing watermelons as much as they do now. Since then, the industry has become more consolidated. Of the 137 importers required to pay assessments, 42 also handle domestically produced watermelons and would be eligible to serve as either a handler or importer member.

At its February 26, 2011, meeting, the Board voted unanimously to modify the importer eligibility requirements to serve on the Board. The Board is having difficulty finding eligible importers to serve on the Board because of the requirement in the Plan that a person who both imports and handles watermelons be counted as an importer only if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person. The Board voted to eliminate the 50 percent or more requirement of the combined total volume of watermelons handled and imported by a person to allow more individuals to become eligible to serve on the Board as importer members. Individuals who both handle and import will be allowed to choose which part of the industry they wish to represent, regardless of the volume handled or imported. The industry believes that this change will increase importer representation on the Board by allowing more individuals to be eligible to serve. This action may also increase diversity on the Board.

The Board considered a second alternative, which was to change the 50 percent or more of the combined total volume of watermelons handled and imported by the person to 25 percent or more of the combined total volume of watermelons handled and imported by the person. However, the Board did not choose this option because they wanted to allow more importers to be eligible for nomination on the Board and found this purpose better served if they eliminated the percentage requirement altogether. Eliminating the percentage requirement for the importer member will allow for smaller importer businesses to become eligible to serve as importer members on the Board.

Additional revisions are made to remove unnecessary language in section 1210.363(b) of the Plan and section 1210.602(a) of the regulations. The language pertains to the conduct of referenda and is no longer applicable as a result of the Watermelon Research and Promotion Improvement Act of 1993 amendments to the Watermelon Research and Promotion Act.

As well, section 1210.404(g) of the regulations, which references importer eligibility requirements, is amended to conform to language amending section 1210.363(b) of the Plan that has been approved in referendum.

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR part 1320] that implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information

collection and recordkeeping requirements that are imposed by the Plan have been approved previously and assigned OMB number 0581-0093, except that the Board member background questionnaire has been approved under OMB number 0505-0001.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other programs.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Additionally, the estimated numbers in the RFA represent the total universe of watermelon producers, handlers, and importers - not only those who were eligible to vote in the referendum.

## **Background**

Under the Plan, the Board administers a nationally coordinated program of research, development, advertising, and promotion designed to strengthen the watermelon's position in the market place and to establish, maintain, and expand markets for watermelons. This program is financed by assessments on producers growing 10 acres or more of watermelons, handlers of watermelons, and importers of 150,000 pounds of watermelons or more per year. The Plan specifies that handlers are responsible

for collecting and submitting both the producer and handler assessments to the Board, reporting their handling of watermelons, and maintaining records necessary to verify their reports. Importers are responsible for payment of assessments to the Board on watermelons imported into the United States through the U.S. Customs and Border Protection. This action has no impact on the assessment rates paid by producers, handlers, and importers.

Membership on the Board consists of two producers and two handlers for each of the seven districts established by the Plan, at least one importer, and one public member. The Board currently consists of 37 members: 14 producers, 14 handlers, 8 importers, and 1 public member. A final rule to increase the number of importers on the Board was published in the July 18, 2011, **Federal Register** [76 FR 42009].

The Watermelon Research and Promotion Improvement Act of 1993 amended the Watermelon Research and Promotion Act by adding importer members to the Board, among other things. At that time the industry recommended that an individual who both handles and imports watermelons may vote for importer members and serve as an importer member only if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person. A final rule was published in the **Federal Register** on February 28, 1995 [60 FR 10795], containing

this and other amendments to the program. At the time of this amendment there was a more clear division of roles among producers, handlers, and importers. In other words, those individuals who imported watermelons did not cross over into handling or producing watermelons as much as they do now. Since then, the industry has become more consolidated. Of the 137 importers required to pay assessments, 42 also handle watermelons and would be eligible to serve as either a handler or importer member.

At its February 26, 2011, meeting, the Board voted unanimously to modify the importer eligibility requirements to serve on the Board. The Board is having difficulty finding eligible importers to serve on the Board because of the requirement in the Plan that a person who both imports and handles watermelon is counted as an importer only if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person. The Board voted to eliminate the 50 percent or more requirement of the combined total volume of watermelons handled and imported by a person to allow more individuals to become eligible to serve on the Board as importers. Individuals who both handle and import will be allowed to choose which part of the industry they wish to represent, regardless of the volume handled or imported. The Board believes that this change will increase the importer

representation on the Board by allowing more individuals to be eligible to serve. This action may also increase diversity on the Board.

Accordingly, this rule amends section 1210.321(d) of the Plan to specify that a person who both imports and handles watermelons may participate in the nomination process and serve on the Board as either an importer or handler, but not both. The change to this section was the only section voted on and approved in the referendum.

Notwithstanding the discussion that appeared in the proposed rule published at 78 FR 64408, a conforming change is made to section 1210.404(g) in Subpart B - Nominating Procedures of Part 1210. This section also pertains to importer eligibility requirements for Board representation.

Pursuant to Section 1654 of the Act, section 1210.363(b) is amended to remove language that no longer effectuates the purpose of the Act. Specifically, the sentences concerning counting votes as producer, handler, or importer votes based on volume are terminated in accordance with section 1654(a) of the Act. Section 1210.363(b) pertains to referenda to suspend or terminate the Plan or any provision thereof. The language removed did not affect the way the amendatory referendum was conducted or how the results were determined.

A conforming change is made to section 1210.602(a) of Subpart D - Referendum Procedures of the Plan to remove similar language. This also no longer effectuates the purpose of the Act.

The Department published the proposal for public comment in the February 13, 2013, **Federal Register** [78 FR 10104]. The comment period ended March 15, 2013. Sixteen comments were received by the deadline. These comments were discussed in the October 29, 2013, proposed rule published in the **Federal Register** [78 FR 64408], which included a referendum order.

#### **General Findings**

As previously mentioned, the Department conducted a referendum among eligible watermelon producers, handlers, and importers from January 13, 2014, through January 27, 2014, to determine whether they favor amending the Plan's importer member requirements to serve on the Board. The representative period for establishing voter eligibility was January 1, 2012, through December 31, 2012. Producers of 10 or more acres of watermelon, watermelon handlers, importers of 150,000 or more pounds of watermelons annually, and importers who import less than 150,000 pounds of watermelons annually and did not apply for and receive assessment reimbursements during the representative period were eligible to vote in the referendum. Additionally, eligible voters had to be currently engaged in the business of producing,

handling or importing watermelons. Seventy-four percent of those voting favored the amendment to the Plan.

After consideration of all relevant matters presented, including the Board's recommendation, the comments received, and the referendum results, it is hereby found that amending section 1210.321(d) of the Plan and section 1210.404 of the regulations will tend to effectuate the declared policy of the Act. It is further found that the sentences concerning counting votes as producer, handler, or importer votes in section 1210.363(b) of the Plan and in section 1210.602(a) of the regulations in Subpart D - Referendum Procedures, do not effectuate the declared policy of the Act, and they are hereby terminated.

#### **Additional Finding**

Pursuant to 5 U.S.C. 553, it is also found that good cause exists for not postponing the effective date of this action until 30 day after publication in the **Federal Register** because this action needs to be in effect as soon as possible to allow sufficient time for completion of the nomination process and appointments for the term of office beginning January 1, 2015. Further, the amendment was approved in a referendum of producers, handlers, and importers.

#### **List of Subjects in 7 CFR Part 1210**



Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Reporting and recordkeeping requirements, Watermelon promotion.

For the reasons set forth in the preamble, part 1210, Chapter XI of Title 7 is amended as follows:

**PART 1210—WATERMELON RESEARCH AND PROMOTION PLAN**

1. The authority citation for 7 CFR part 1210 continues to read as follows:

**Authority:** 7 U.S.C. 4901-4916 and 7 U.S.C. 7401.

2. In § 1210.321, paragraph (d) is revised to read as follows:

**§ 1210.321 Nomination and selection.**

\* \* \* \* \*

(d) Nominations for importer positions that become vacant may be made by mail ballot, nomination conventions, or by other means prescribed by the Secretary. The Board shall provide notice of such vacancies and the nomination process to all importers through press releases and any other available means as well as direct mailing to known importers. All importers may participate in the nomination process. A person who both imports and handles watermelons may participate in the nomination process and serve on the Board as either an importer or handler, but not both.

\* \* \* \* \*

3. In § 1210.363, paragraph (b) is revised to read as follows:

**§ 1210.363 Suspension or termination.**

\* \* \* \* \*

(b) The Secretary may conduct a referendum at any time and shall hold a referendum on request of the Board or at least 10 percent of the combined total of the watermelon producers, handlers, and importers to determine if watermelon producers, handlers, and importers favor termination or suspension of this Plan. The Secretary shall suspend or terminate this Plan at the end of the marketing year whenever the Secretary determines that the suspension or termination is favored by a majority of the watermelon producers, handlers, and importers voting in such referendum who, during a representative period determined by the Secretary, have been engaged in the production, handling, or importing of watermelons and who produced, handled, or imported more than 50 percent of the combined total of the volume of watermelons produced, handled, or imported by those producers, handlers, and importers voting in the referendum. Any such referendum shall be conducted by mail ballot.

4. In § 1210.404, revise paragraph (g) to read as follows:

**§ 1210.404 Importer member nomination and selection.**

\* \* \* \* \*

(g) A person who both imports and handles watermelons may participate in the nomination process and serve on the Board as either an importer or handler, but not both.

5. In § 1210.602, paragraph (a) is revised to read as follows:

**§ 1210.602 Voting.**

(a) Each person who is an eligible producer, handler, or importer as defined in this subpart, at the time of the referendum and who also was a producer, handler, or importer during the representative period, shall be entitled to one vote in the referendum: Provided, That each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce watermelons in which more than one of the parties is a producer, shall be entitled to one vote in the referendum covering only that producer's share of the ownership.

\* \* \* \* \*

Dated: March 11, 2014

Rex A. Barnes  
Associate Administrator

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